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IN THE

Supreme Court of the United States

October Term, 1970

No. ~~1268~~ 1643

MARLON BRANDO,

Petitioner,

vs.

ROBERT COFFMAN, ROBERT FREDERICKS and OWEN C. BROWN,

Respondents.

Petition for a Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District, Division Five, or in the Alternative to the California Supreme Court.

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Petition for a Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District, Division Five, or in the Alternative to the California Supreme Court.

Marlon Brando ("petitioner") requests the issuance of a Writ of Certiorari to review the judgment of the Court of Appeal of the State of California, Second Appellate District, Division Five, which was entered on December 10, 1970, or in the alternative to review the "Order Denying Petition For Hearing" entered by the California Supreme Court on February 8, 1971.

Opinions Below.

The opinion of the Court of Appeal of the State of California, Second Appellate District, Division Five (hereinafter sometimes referred to as the "DCA" or the "Court of Appeal") is set forth in Appendix A hereto (Reported in 13 Cal. App. 3d 409 (1970)); the Order of the Court of Appeal denying Brando's

Petition for Rehearing is set forth in Appendix B hereto; and, the Order of the California Supreme Court denying Brando's Petition for Hearing is set forth in Appendix C hereto.

Jurisdiction.

The judgment of the Court of Appeal of the State of California, Second Appellate District, Division Five was entered on December 10, 1970, reversing the trial court's judgment of dismissal dated May 2, 1969 as to the respondents herein. The Court of Appeal denied a timely petition for rehearing on December 31, 1970. The California Supreme Court denied a timely petition for hearing on February 8, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. §1257 (3).

Questions Presented.

1. Is a speaker's absolute and unqualified First and Fourteenth Amendment right to speak out, with or without malice, in *impersonal* criticism of a government agency violated by allowing spoken language which on its face refers only to a government agency (*i.e.*, "the police department") to be the subject of a private defamation action by individual employees or officials of the government agency?

2. May spoken language which by the very allegations of the complaint applies (if it has *personal* application at all) to a group of not less than 650 police officers be the subject of a defamation action by individual members (*i.e.*, police officers) of such group when such language does not even obliquely refer to said individual members without violating the speaker's federal First and Fourteenth Amendment rights of free speech?

3. Are the statements allegedly spoken by petitioner in a forum for public discussion (*i.e.*, a nationally televised television "talk show"), especially when made in the context of a discussion of a pervasive societal, ethnic and political problem, capable of bearing a defamatory meaning so as to support a defamation action against petitioner without violating petitioner's federal First and Fourteenth Amendment rights of free speech?

4. May a public official, consistently with the First and Fourteenth Amendment guarantees of free speech, force a defamation suit (based on public criticism of his official conduct) to trial by pleading "malice" in conclusory terms (*i.e.*, by simply alleging ". . . reckless disregard for the truth or falsity of the statements made") without pleading *facts* to support the conclusory allegations?

Constitutional Provisions and State Statutes Involved.

This case involves the free speech provisions of the First Amendment to the United States Constitution as applied to the State of California through the Fourteenth Amendment to the United States Constitution.

The First Amendment provides as follows:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The Fourteenth Amendment provides in part as follows:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction

thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . . ."

Also involved is §46 of the California Civil Code which provides in part as follows:

"Slander is a false and unprivileged publication, orally uttered, and also communications by radio or any mechanical or other means which:

1. Charges any person with crime, or with having been indicted, convicted, or punished for crime . . ."

Statement of the Case.

On or about June 20, 1968, Samson B. Mullins, Robert Coffman, Robert Fredericks and Owen C. Brown filed a Complaint for Defamation against petitioner and several other named defendants. Messrs. Coffman, Fredericks and Brown (hereinafter sometimes referred to as the "individual plaintiffs") sued in their own names individually in separately stated causes of action. Mr. Mullins, as president of the Oakland Police Officers Association (hereinafter referred to as "OPOA") purportedly sued on behalf of the OPOA as well as on behalf of all of its members (Mullins and the other members of the OPOA and the OPOA itself shall sometimes hereafter be referred to as "the OPOA plaintiffs"). The complaint alleged that petitioner, during a television appearance on the "Joey Bishop Show" of April 25, 1968, uttered certain remarks which were

broadcast throughout the State of California and diverse other places to a television audience from the Los Angeles studios of the American Broadcasting Companies, Inc. The remarks attributed to petitioner were attached to the complaint as Exhibit "A" and are set forth in full as follows:

> Marlon Brando:
>
> "I thought . . . I didn't know what to do. I felt that we've come to the end of something and the beginning of something else . . . that was dangerous, awesome, and frightening and unbelievable. And I thought I'd better find out. I'd better do what I can. I just don't understand. I don't know enough. I don't get enough from the newspaper reports. I don't get enough from people I talk to. I better go and find out where it is in this country. What it is to be black in this country. What this rage is all about. And I went up to, I suppose a place which could be considered the center of rage, which is San Francisco and Oakland, and I visited with some Black Panthers there. And I heard their views and I listened to their thoughts and I was told that the police department was out to get the Panthers. One of the guys I met up there was a kid by the name of Bobby Hutton. . . . He was 17 years old. . . . A beautiful kid. And in two days he was in a shootout with the police. He came out of the house with his hands up and he was told to run for the car and he was shot dead and killed. And I subsequently went to his funeral and I saw that kid lying in the coffin and I thought. . . . He'd been in the Panthers for two years and I thought. . . . What was he doing there. What was he doing with

a gun in his hand blazing at the police. How did it happen that

Joey:

"Marlon, I just want to correct one thing. I know the emotionalism that you're involved in. . . . You did say prior to this time that he came out without . . . with his hands up.

Marlon Brando:

"He was told to come out. They surrendered and he came out with his hands full up and he was told to run for the car. And he was shot down in front of any number of witnesses. . . ."

On September 17, 1968, the trial court sustained petitioner's general demurrer to the complaint. Thereafter, on October 3, 1968, plaintiffs filed a "First Amended Complaint for Defamation". On December 4, 1968, the trial court judge sustained petitioner's general demurrer to the First Amended Complaint. In its order, the court stated that:

". . . the language used does not ordinarily impute a crime in it's (sic) natural construction; and no special damages showing out-of-pocket or monetary loss to plaintiff is alleged".

Thereafter, on January 21, 1969, plaintiffs filed their Second Amended Complaint for Defamation to which the aforesaid Exhibit "A" was again attached (said Second Amended Complaint is attached hereto as Appendix D).

A second trial court judge sustained petitioner's general demurrer to the Second Amended Complaint with leave to amend, and in the court's Minute Order of March 19, 1969, commented as follows:

"The Second Amended Complaint is in all material respects essentially similar to the First Amend-

> ed Complaint. The language used is not fairly susceptible of a construction which charges a crime or imputes criminal conduct to the officers . . ."

The plaintiffs declined to amend their Second Amended Complaint and elected to appeal from the trial court's judgment of dismissal with prejudice. Petitioner, among other things, argued orally and in writing before the DCA: (a) that the language of which plaintiffs complained was not capable of bearing a defamatory meaning under the First and Fourteenth Amendment standards of free speech announced by this Court in *Greenbelt Cooperative Publishing Association v. Bresler,* 398 U.S. 6 (1970) (See Certified Record, Item #7—Letter dated September 25, 1970) (Said letter appears in Appendix E hereto); (b) that as a matter of law under the First and Fourteenth Amendments to the Constitution, the language attributed to petitioner, if it has *personal* application at all, at most referred to a large group and hence could not be held to be "of and concerning the individual plaintiffs or OPOA in light of the standards set down by this Court in *New York Times Company v. Sullivan,* 376 U.S. 254 (1964) (See Certified Record, Item #4—Respondent's Brief, pp. 22-23); (c) that his alleged statement, even if defamatory and spoken with malice, was *absolutely privileged* and protected by the First and Fourteenth Amendments (and hence not properly the subject of any lawsuit at all) because the alleged statement *only* referred, at most, to a *police department,* a governmental agency, and because such a statement constituting impersonal criticism of government cannot be transmuted into personal criticism of individual police officers and used by them as the basis of a private lawsuit for defamation (See Certified Record, Item #4—Respondent's

Brief, pp. 24-30); and (d) that plaintiffs are "public officials" about whom petitioner allegedly spoke in their official capacities and that such plaintiffs did not adequately plead *facts* sufficiently showing the malice necessary to circumvent the free speech protection afforded by the First and Fourteenth Amendments (See Certified Record, Item #1—Clerk's Transcript, pp. 100-102 and 108). The last argument was raised by petitioner in support of each of his demurrers and was considered and rejected by the DCA on pages 21-27 of its opinion (Appendix A, pp. 14-17). The first three arguments were raised for the first time on appeal (although the first two arguments were raised in terms of state defamation law in support of petitioner's demurrers) and were respectively ruled upon by the DCA adversely to petitioner on pages 10-11 (Appendix A, pp. 5-8) and pp. 12-21 (App. A, pp. 8-14) of its opinion.

On December 10, 1970, the District Court of Appeal filed its opinion and judgment (Appendix A) in which it reversed the trial court's judgment as to the individual plaintiffs and affirmed the trial court's judgment as to the OPOA plaintiffs. On December 31, 1970, the DCA, without rendering a further opinion, denied petitioner's timely petition for rehearing, and on February 8, 1971, the California Supreme Court, without an opinion, denied petitioner's timely petition for hearing. Accordingly, the disposition of petitioner's Constitutional arguments by the DCA have now become the law of the case and cannot be re-argued in the state court litigation.

REASONS FOR GRANTING THE WRIT.

The DCA's judgment in overruling petitioner's demurrer has become final with respect to all constitutional arguments raised by petitioner since those arguments can no longer be argued or litigated in the California courts. By overruling petitioner's constitutional arguments and requiring petitioner to engage in long and complex litigation to defend his alleged criticisms of a police department, the DCA has seriously eroded the national federal policy of protecting free speech, especially in the political and governmental arena. It is of critical importance that this court encourage early summary disposal of lawsuits, frivolous or otherwise, which threaten the very exercise of freedom of speech. The constitutional issues raised by petitioner are too important to be denied review, and this court should exercise its discretion to review the DCA's judgment under 28 U.S.C. §1257(3). See *Mills v. State of Alabama,* 384 U.S. 214 (and concurring opinion of Justice Douglas) (1966); *Rosenblatt v. American Cyanamid Company,* 86 S. Ct. 1, 2-3 (1965); *Hudson Distributors, Inc. v. Eli Lilly & Co.,* 377 U.S. 386 (1964); *Local No. 438 Construction & General Laborer's Union v. Curry,* 371 U.S. 542 (1963); *Mercantile National Bank v. Langdeau,* 371 U.S. 555 (1963); *Pope v. Atlantic Coast Line Railroad Co.,* 345 U.S. 379 (1953); *Radio Station WOW v. Johnson,* 326 U.S. 120 (1945).

> "In this context, sanctions against either innocent or negligent misstatement would present a grave hazard of discouraging the press from exer-

cising the constitutional guarantees. Those guarantees are not for the benefit of the press so much as for the benefit of all of us. A broadly defined freedom of the press assures the maintenance of our political system and an open society. *Fear of large verdicts in damage suits for innocent or merely negligent misstatement, even fear of the expense involved in their defense, must inevitably cause publishers to 'steer * * * wider of the unlawful zone,'* (citations omitted) *and thus 'create the danger that the legitimate utterance will be penalized.'* (Citations omitted)" (Emphasis added). *Time, Inc. v. Hill,* 385 U.S. 374, 389 (1967).

"Because the *threat* or actual imposition of pecuniary liability for alleged defamation may impair the unfetered exercise of these First Amendment freedoms, the Constitution imposes stringent limitations upon the permissible scope of such liability." (Emphasis added.) *Greenbelt Cooperative Publishing Association v. Bresler,* 398 U.S. 6, 90 S. Ct. 1537 at 1541 (1970).

"In the First Amendment area, summary procedures are even more essential. For the stake here, if harassment succeeds, is free debate. One of the purposes of the *Times* principle, in addition to protecting persons from being cast in damages in libel suits filed by public officials, is to prevent persons from being discouraged in full and free exercise of their First Amendment rights with respect to the conduct of their government. *The threat of being put to the defense of a lawsuit brought by a popular public official may be as chilling to the exercise of First Amendment free-*

doms as fear of the outcome of the lawsuit itself, especially to advocates of unpopular causes." (Emphasis added.) *Washington Post Co. v. Keogh,* 365 F. 2d 965, 968 (D.C. Cir. 1966).

As was pointed out to the DCA in oral argument, (Certified Record Item #6—Reporter's Transcript of Oral Argument, p. 23, lines 6-11, p. 28, line 18, to p. 29, line 9) the constitutional questions raised by petitioner before the DCA and this court have been raised by, and have identical application to, Herb Caen and The Chronicle Publishing Company in a lawsuit brought by the plaintiffs in this case against those parties. That lawsuit (*Samson B. Mullins, etc. et al. v. Charles De Young Thieroit, The Chronicle Publishing Company, Inc., etc. et al.,* California Court of Appeal, 1 Civil No. 27683) involved a statement published in the San Francisco Chronicle also about the shooting of Bobby Hutton. If this court does not review this case at this time, the disposition of the *Chronicle* appeal will, in all probability, be identical to the outcome in this case and the far reaching chill on the publishing freedom of newspapers as well as the dissent of private citizens will be grim indeed.

A. The Statement Attributed to Petitioner Constituted, at Most, Impersonal Criticism of Government and Hence Is Absolutely Protected by the First and Fourteenth Amendments and Cannot Under Any Circumstances Be the Subject of a Defamation Action by Anyone at All.

On page 291 of its decision in *New York Times Company v. Sullivan, supra,* this court stated that:

"For good reason 'no court of last resort in this country has ever held, or even suggested, that prosecutions for libel on government have any place in the American system of jurisprudence' ".

This court further stated that a published criticism *which on its face* refers impersonally only to a governmental agency, without any reference to the individual members or officials thereof, cannot by any "legal alchemy" be transmuted ". . . into personal criticism, and hence potential libel of the officials of whom the government is composed". 376 U.S. 292.

The DCA narrowly read the *New York Times* decision as merely

> ". . . prohibit(ing) plaintiffs from coming forward and claiming that they are victims of defamatory attacks on governmental actions for the only reason that such plaintiffs are, by virtue of their position, legally responsible for the action criticized". (Appendix A, pp. 11-12).

The DCA held that the foregoing principles do *not* apply to the situation where, as here, the plaintiffs are (according to their own allegations) *actually*, as opposed to only legally, responsible for the criticized government actions.

We contend that the DCA's attempt to distinguish the *New York Times* case is specious. *New York Times Company v. Sullivan, supra,* commands the states to refuse to allow prosecution of civil libel suits by *anyone* based on statements which on their face merely constitute *impersonal* criticism of government. This rule applies whether or not the plaintiffs were *actually* rather than only legally responsible for the government actions discussed. The rule cannot be circumvented by the prosecution of private libel actions brought by officials of whom such governmental agencies are composed.

The utterance ascribed to Petitioner was, at most merely a statement about the operation of governmental

agencies (*i.e.*, unnamed police departments) in relation to a political, ethnic and social problem, *i.e.*, the race problem. Indeed, the only references to the object of petitioner's alleged utterance appeared by the use of the impersonal words *"police department"* (once) and "police" (twice). At no place in the alleged utterance do any words appear which indicate that petitioner spoke of any individual police officers or members of the police department or OPOA (or even of any identified police department). Not even the impersonal pronouns "they", or "them" appear in the alleged utterance.

It is critical that this court now review the DCA's judgment in order to explain that in *New York Times Company v. Sullivan, supra,* this court intended to and did enunciate a rule which gives *absolute* protection to one who speaks out in impersonal criticism of the government which serves him and his listeners (especially, when as in this case, the statements are made in a forum for public discussion, *i.e.*, a nationally televised "talk show"). If this rule is not made clear, free debate, and public criticism of government will be chilled, if not frozen, by the fear of prosecution of civil libel suits, whether ultimately successful or unsuccessful, by individual government employees or officials whose identities, positions or existence are not even remotely suspected by the speaker. If the court were to allow this case and similar cases to proceed to trial it would be condoning prosecutions no different in effect from the abhorrent seditious libel provisions of the Sedition Act of 1798, 1 Stat. 596. (See *New York Times Company v. Sullivan, supra,* 273-277.)

B. The Statement Charged to Petitioner by the Very Allegations of Plaintiff's Complaint, Refers to a Group of Not Less Than 650 Police Officers and Hence Cannot Be "of and Concerning" Plaintiffs, or Any of Them.

On pages 288 and 289 of its decision in *New York Times Company v. Sullivan, supra,* this court held that the First and Fourteenth Amendment safeguards of free speech must be applied in determining whether or not a defamatory statement is or can be understood to be "of and concerning" a plaintiff.

It is clear from the very face of the complaint in this case that plaintiffs maintain that petitioner's alleged utterance referred to an entire group of not less than 650 police officers. (Appendix D, paragraphs 2, 11 and 16.) It further appears from the face of the complaint that each of the individual plaintiffs are members of the large group (Appendix D, pp. 28, 29 and 30), that each of the individual plaintiffs and "numerous" members of OPOA were present at the time and place of the shooting of Bobby Hutton (Appendix D, paragraph 14), and that each of the individual plaintiffs fired pistols at Bobby Hutton, but that plaintiffs have no information or belief as to which shots fired by said plaintiffs hit Bobby Hutton (Appendix D, paragraph 14). Further, as discussed, *supra,* petitioner's alleged statement did not on its face have personal application to any individual members of the group.

Nevertheless, the DCA held that because the individual plaintiffs pleaded extrinsic facts showing that they *may possibly* have been directly physically responsible for the shooting of Bobby Hutton, petitioner's alleged utterance could possibly be understood to be "of and concerning" plaintiffs. Hence, the DCA's opin-

ion is at direct variance with the opinion of the *federal* Ninth Circuit Court of Appeals in *Golden North Airways v. Tanana Publishing Corp.*, 218 F. 2d 612 (9th Cir. 1954), as well as with a long line of federal district court cases. See *Robinson v. Guy Gannet Publishing Co.*, 297 F. Supp. 722 (D. Me. 1969); *Riverhouse Publishing Company v. Porter*, 287 F. Supp. 1 (D.R.I. 1968); *Riss & Company v. Association of American Railroads*, 187 F. Supp. 323 (D.D.C. 1960); *Nieman Marcus v. Lait*, 13 F.R.D. 311 (S.D.N.Y. 1952); *Fowler v. Curtis Publishing Co.*, 78 F. Supp. 303 (D.D.C. 1948). See also *Service Parking Corporation v. Washington Times Co.*, 92 F. 2d 502 (D.C. Cir. 1937).

It should be noted that this Court has never announced a definitive decision in the area of group defamation.* It has never decided the issue of whether or when an individual member of a large group which has allegedly been defamed may maintain a private defamation action in his own behalf. This Court should now review this case in order to resolve the discrepancies between the DCA's opinion and the foregoing

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*The only group defamation case decided by this Court was *Beauharnais v. People of Illinois*, 343 U.S. 250 (1952). The Court in that case upheld the constitutionality of a criminal statute of the State of Illinois which punished defamatory or inflamatory statements made about "any race, color, creed or religion" and which was designed to prevent race riots. The 5-4 decision badly split the Court and produced four separate opinions. The vitality and validity of the *Beauharnais* decision has been questioned both by lower courts (*Anti-Defamation League of B'Nai B'rith etc. v. F.C.C.*, 403 F. 2d 169 (D.C. Cir., 1968) (concurring opinion, f.n. #4) and by this Court itself (*Curtis Publishing Company v. Butts*, 388 U.S. 130, 143 (f.n. #7) (1967)). This court should now take this opportunity to explain the application of *Beauharnais*, if any, to civil defamation suits, or at the very least, define the strict limits within which civil actions for group defamation will be allowed.

federal decisions and elevate the common law prohibition against individual defamation actions based on group defamation to constitutional status. It is important that this court now settle the question of whether statements about a large group, whose size in this case reaches huge institutional dimensions, may, consistently with the First and Fourteenth Amendment standards set forth in *New York Times Company v. Sullivan, supra,* be the basis of private defamation actions by individual members of the group, especially when such group is a collection of government employees whose official activities have been commented upon.

C. The Alleged Utterance Could Not Be Understood as Imputing a Crime to Plaintiffs Under the Free Speech Guarantees of the First and Fourteenth Amendments.

The recent case of *Greenbelt Cooperative Publishing Association v. Bresler,* 398 U.S. 6 (1970) established that the First and Fourteenth Amendments protect language, which is published in the context of public discussion of public issues, from being held capable of bearing a defamatory meaning. The *Greenbelt* case and the constitutional standards announced therein were urged by petitioner in a post-hearing letter to he DCA (Certified Record, Item #7; Appendix E hereto dated September 25, 1970), as a basis for his contention that the subject utterance is not capable of bearing a defamatory meaning (*i.e.,* imputation of crime). Petitioner's reliance on *Greenbelt* was rejected by the DCA. (Appendix A, pp. 7-8.)

It is clear from the utterance allegedly made by petitioner, that Bobby Hutton was in possession of a firearm and was firing his weapon at the police at the

time of the shooting referred to. It is also clear from the alleged utterance that the police department or departments referred to therein were attempting to accomplish an arrest at the time of the shooting. The only reasonable meaning inferable from petitioner's alleged utterance is that the police referred to (in the institutional sense) were acting in the course of their legal duty, attempting to accomplish an arrest in a confrontation with members of a militant black political party, and overcoming resistence to the accomplishment of that purpose at the time of the shooting. It is clear that petitioner, if he uttered the words attributed to him, was merely registering his concern with the decay in relations between members of the black race and governmental law enforcement agencies. Petitioner expressed his concern by pointing, by way of example only, to the violent death of a 17 year old boy, "a beautiful kid", at the hands of a law enforcement agency. Petitioner neither condoned nor condemned the method, tactics or events which caused Mr. Hutton's death.

In view of the *Greenbelt* decision, petitioner's alleged remarks cannot, as a matter of constitutional law, be defamatory, especially since such remarks clearly constituted no more than public discussion (in a nationally televised forum for public discussion) of the widely reported acts of a governmental law enforcement agency at a time when race relations and the authorities' handling of minorities are of immediate and widespread concern. As in *Greenbelt Cooperative Publishing Association v. Bresler, supra,* it is here impossible to believe that any listener who heard the words attributed to petitioner could have thought that by using the words singled out by plaintiffs, when

viewed in the total context of petitioner's alleged statements, petitioner was charging the plaintiffs or anyone else with any of the crimes alleged in the complaint, or that petitioner was doing anything more than commenting on the condition of our society and citing a specific incident, about which he had been told, without laying blame on any of the participants, as an illustration of that condition. If the DCA is correct in holding that under state defamation law the subject utterance is capable of bearing a defamatory meaning under §46(1) California Civil Code, that state statute is unconstitutional as applied to the facts of this case, and this court should so hold.

D. The Individual Plaintiffs, as Police Officers, Are Public Officials and Have Not Adequately Pleaded the Actual Malice Sufficient to Circumvent the Qualified Privilege Established by New York Times Company v. Sullivan, Supra.

There is no doubt that the individual police officer plaintiffs are "public officials" as that term was used in *New York Times Company v. Sullivan, supra. St. Amant v. Thompson,* 390 U.S. 727 (1968) (deputy sheriff); *Henry v. Collins,* 380 U.S. 356 (1965) (police chief); *New York Times Company v. Sullivan, supra* (police commissioner).

The DCA held that such public officials may satisfy the constitutional requirement of malice at the pleading stage by simply alleging in conclusory terms that defendant's statement was made ". . . *with reckless disregard* for the truth or falsity of the statement made". The DCA held that the allegation of specific *facts* to support the conclusory allegation was not necessary to avoid a general demurrer based on the First

Amendment qualified privilege. The DCA stated at page 25 of its opinion:

> "We do not see how we can demand more at this stage, particularly when the Supreme Court itself has not given us a conclusive or inclusive definition of the term 'reckless disregard' ". (Appendix A, p. 17.)

By the latter statement, the DCA requested guidance from this court on the pleading issue, which has never been decided by this court. It is critical that this court now grant review of the DCA's judgment in order to give the requested guidance by announcing a rule of pleading which requires the allegation of specific facts to support a conclusory allegation of malice. Such a rule will prevent, by requiring prior consideration of the facts, frivolous defamation suits which may have a repressive effect on free discussion of the official activities of government officials and will afford a defendant adequate notice to enable him to utilize the summary procedures which are so important in defamation suits involving First and Fourteenth Amendment rights.

Conclusion.

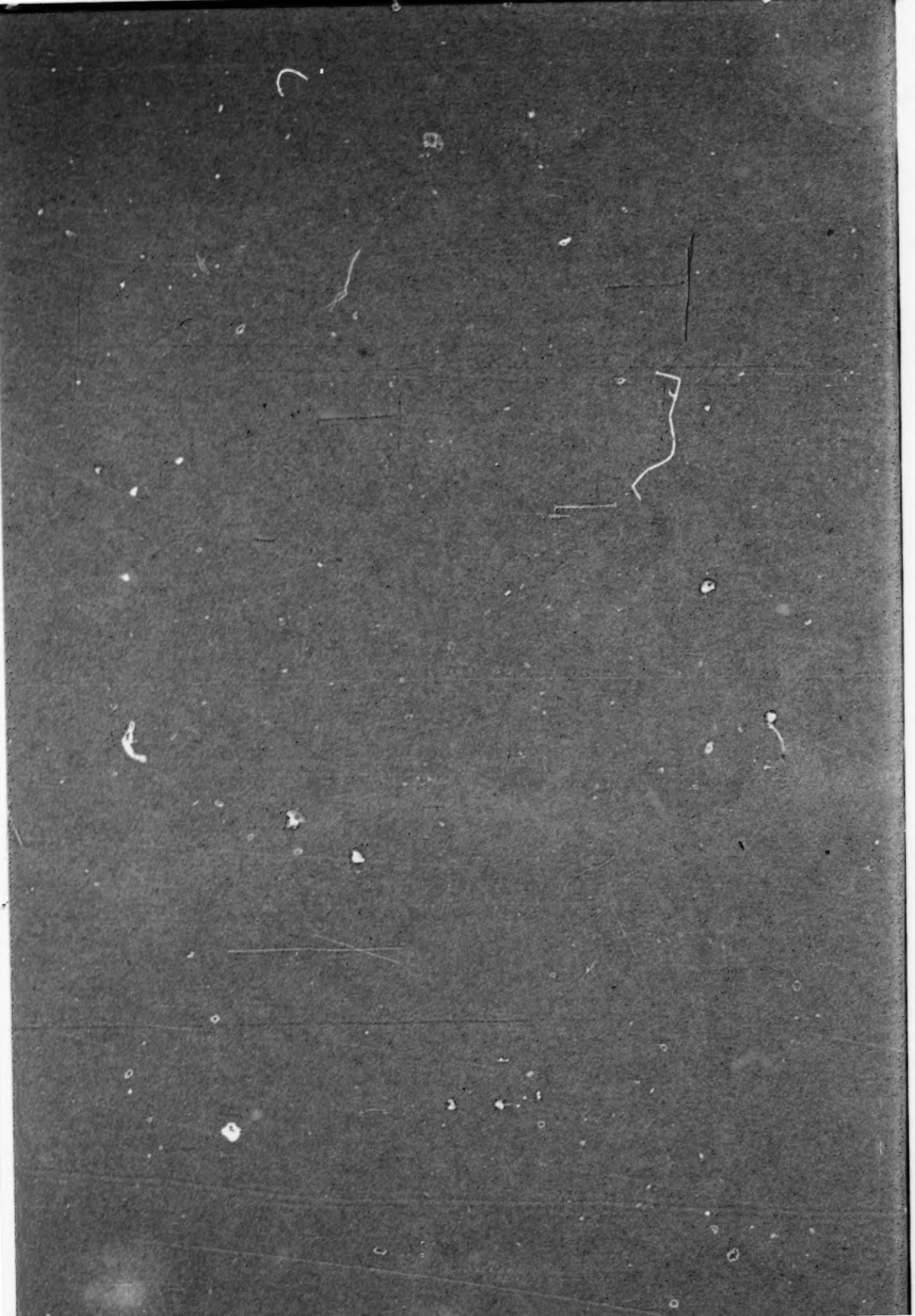
For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX "A".

Opinion of the Court of Appeal.

In the Court of Appeal of the State of California, Second Appellate District, Division Five.

Samson B. Mullins, as President and on behalf of the Oakland Police Officers Association, etc., et al. Plaintiffs and Appellants, vs. Marlon Brando, Defendant and Respondent. S. Ct. No. 937390.

Filed, Dec. 10, 1970.

APPEAL from a judgment of the Superior Court of Los Angeles County. Laurence J. Rittenband, Judge. Affirmed in part, reversed in part.

Pettis & Brott, for Plaintiffs and Appellants.

Rosenfeld, Meyer & Susman, Norman H. Garey and Stephen A. Kroft, for Defendant and Respondent.

Plaintiffs appeal from a judgment entered after defendant's general demurrer to their second amended complaint was sustained with leave to amend and no amendment was filed.

There are two sets of plaintiffs. Those whom we shall call the "individual plaintiffs" (Robert Coffman, Robert Fredericks and Owen C. Brown) identify themselves as police officers who were involved in a confrontation in the course of which they fired shots at one Bobby Hutton. The fourth plaintiff is Samson P. Mullins who describes himself to the court as the president of the Oakland Police Officers Association (OPOA) and states that he is suing on behalf of OPOA as well as on behalf of its members. OPOA is an unincorporated association made up of all of the members of the Oakland Police Department, about

650 in number. We shall refer to Mullins and the other members of OPOA as the "OPOA plaintiffs."

Factually the complaint alleges that on April 25, 1968, the defendant appeared as a guest on a television program where he was interviewed by Joey Bishop, the host of the show. The program was heard by millions of persons, including residents of Alameda County. During the program defendant made a statement concerning the death of one Bobby Hutton, a member of the Black Panthers.

In defendant's statement he describes reasons why he had decided to investigate "what it is to be black in this country" and "what this rage is all about." He said he had traveled to the San Francisco-Oakland area, "a place which could be considered the center of rage." There he had visited with certain Black Panthers. He continued: "I heard their views and I listened to their thoughts and I was told that the police department was out to get the Panthers. One of the guys I met up there was a kid by the name of Bobby Hutton. . . . He was 17 years old . . . A beautiful kid. And in two days he was in a shoot-out with the police. He came out of the house with his hands up and he was told to run for the car and he was shot dead and killed. And I subsequently went to his funeral and I saw that kid lying in the coffin and I thought . . . he'd been in the Panthers for two years and I thought . . . what was he doing there. What was he doing with a gun in his hand blazing at the police. How did it happen that—"

Defendant's interviewer then, helpfully, interrupted and asked: "You did say prior to this that he came out without . . . with his hands up." Defendant re-

plied: "He was told to come out. They surrendered and he came out with his hands full up and he was told to run for the car. And he was shot down in front of any number of witnesses. . . ."

The operative words obviously are: 1. that defendant was told that the police department was out to "get the Panthers"; 2. that Hutton "came out of the house with his hands up and he was told to run for the car and he was shot dead and killed"; and 3. a variant of this statement to the effect that Hutton "was told to come out. They surrendered and he came out with his hands full up and he was told to run for the car. And he was shot down in front of any number of witnesses."

The complaint then alleges on April 6, 1968, there had been a "gun battle" which had been provoked by members of the Black Panthers. Members of the Oakland, Emeryville[1] and other police departments participated. The individual plaintiffs fired pistols at Bobby Hutton, but do not know which shots fired by them found their mark.

The innuendo pleaded in the complaint is that OPOA and its members were out to "get" the Black Panthers by violent means, that in pursuance of that aim they deliberately became involved in the gun battle during which Hutton was shot, that Hutton was "deceived" to run to an automobile, that he was then deliberately killed and that "OPOA and the members of OPOA are and were of the mentality and disposition to use murder, deceit and ambush and other illegal actions as a policy for and means of performing [their] duties

[1]Plaintiff Brown is a member of the Emeryville Police Department. He is apparently not a member of OPOA.

and that [they] did in fact use such means and implement said policy in reference to Bobby Hutton. . . ."

The complaint also contains allegations of falsity, malice, an unheeded demand for retraction pursuant to section 48a of the Civil Code and of general, as well as punitive damages. No special damages are claimed. Allegations of malice which are claimed to be insufficient will be discussed below.

The record filed with this court does not show by what arguments defendant persuaded the trial court that his general demurrer was good.[2] Before this court he contends: 1. his statement is not reasonably susceptible of a meaning that brings it within any of the first four subdivisions of section 46 of the Civil Code; therefore, since he is charged with slander, rather than libel, he is not liable without a pleading of special damages; 2. one of the rules applied in *New York Times v. Sullivan*, 376 U.S. 254, forbids a finding that his statement referred to any or all plaintiffs; 3. in any event plaintiffs have not adequately pleaded that the statement was made "of or concerning" them; 4. neither OPOA as an entity nor the OPOA plaintiffs, as a class, have shows any cause of action in themselves; 5. apart from *New York Times v. Sullivan, supra,* defendant's statement is privileged under subdivision 3 of section 47 of the Civil Code, malice having been inadequately alleged.

We have come to the conclusion that the judgment must be reversed insofar as it affects the individual

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[2]Defendant did file one special demurrer for uncertainty, claiming that it could not be ascertained "in what manner or in what respect the alleged utterance was false." The record shows that the trial court's ruling was not based on the special demurrer. Had it been, it would have been erroneous.

plaintiffs, but should be affirmed as far as the OPOA plaintiffs are concerned. We shall first discuss the formers' case.

The Individual Plaintiffs

It is, of course, conceded by plaintiffs, that, in the absence of special damages, they can only recover if defendant's statement comes within any of the first four subdivisions of section 46 of the Civil Code. They urge, however, that, reasonably interpreted, defendant's statement amounted to a charge of a crime and, further, that it tended directly to injure them in respect to their profession by imputing to them a general disqualification in respects which their occupation peculiarly required. It seems obvious to us that a reasonable, if not the only possible, interpretation of defendant's statement is that after Hutton surrendered with his hands up[3] and, on command, had run to an automobile he was "shot dead and killed." In the context of the entire statement it seems clear—or at least a jury could so find—that defendant was not talking about an accidental killing, a killling in self-defense, or even a negligent homicide, but was implying murder—an execution.

Defendant now argues that no such charge could reasonably be inferred from his statement because it "does not state that Hutton did not have a gun in his hands when he was allegedly shot and killed." Such an argument reminds one of Prosser's parade of horribles: "The reluctance with which the common law courts at first entertained actions for defamation led them to hold that words must be interpreted in the best possible sense, and that the plaintiff must negative any

[3]When defendant repeated the statement it was "full up."

possible nondefamatory meaning. The result was a set of artificial and absurd rules of pleading and proof, by which 'Thou art as arrant a thief as any is in England' was not actionable until it was pleaded that there were thieves in England, and 'Thou art a murderer, for thou art the fellow that dist kill Mr. Sydman's man' required an averment that any man of Mr. Sydman's had in fact been murdered. . . ."[4] (Prosser, Law of Torts (3rd ed. 1964) ch. 21, § 106, p. 764.)

This state is no stranger to similar attitudes. A line of cases, since disapproved in *MacLeod v. Tribune Publishing Company,* 52 Cal.2d 536, 549-551, required pleaders, at least in certain cases, to negative by way of inducement and innuendo that the alleged defamatory statement did not have a possible innocent meaning. (*Peabody v. Barham,* 52 Cal.App.2d 581, 584.) Such, of course, is no longer the law. We now measure the defamatory impact of the publication ". . . not so much by its effect when subjected to the critical analysis of a mind trained in the law, but by the natural and probable effect upon the mind of the average reader. A defendant is liable for what is insinuated, as well as for what is stated explicitly. . . ." (*MacLeod v. Tribune Publishing Co., supra,* 52 Cal.2d at 547; see also *Kapellas v. Kofman,* 1 Cal.3d 20, 34.)

Further it is too well established to require citation of authorities that the defendant's utterance must be judged as a whole and in the context in which it was made. It seems hardly likely that a reasonable viewer of

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[4]These cases are probably just examples of what Justice Holmes has described as "the inability of the seventeenth century common law to understand or accept a pleading that did not exclude every misinterpreation capable of occurring to intelligence fired with a desire to pervert." (*Paraiso v. United States,* 207 U.S. 368, 372.)

the program on which defendant appeared would believe that defendant thought it was worth the attention of a coast-to-coast audience that certain Oakland police officers had killed somebody in self-defense. It seems plain to us that he issued a charge, not a vindication.

Defendant places great reliance in *Greenbelt Coop. Pub. Asso. v. Bresler,* 398 U.S. 6, decided on May 18, 1970.[5] There a newspaper article reported various public meetings at which several people described the plaintiff's negotiating position with respect to a zoning matter as "blackmail." In addition a column subheading consisting of the one word "blackmail." A judgment for the plaintiff was reversed for two reasons. First, the trial court's instructions ran afoul of the constitutional standard of "actual" malice. Second, the Supreme Court found that even under proper instructions the judgment violated the First Amendment. The newspaper reports in question had correctly described the plaintiff's negotiations with the public entity concerned and it was clear that he had not committed the crime of blackmail as defined by the law of Maryland. Thus, said the court, ". . . even the most careless reader must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet used by those who considered Bresler's negotiating position extremely unreasonable. Indeed, the record is completely de-

[5]*Greenbelt* is one of the several decisions which follow and apply the rule of *New York Times v. Sullivan, supra,* 376 U.S. 254, which case strictly delimits the power of states to discourage criticism of public officials by the application of defamation laws violative of the First Amendment. Plaintiffs properly concede that First Amendment considerations apply to criticism of police officers and departments. The cases are collected in 19 American Law Reports, Third Series, pages 1361, 1375-1377.

void of evidence that anyone in the city of Greenbelt or anywhere else thought Bresler had been charged with a crime." (*Greenbelt Coop. Pub. Asso. v. Bresler, supra,* 398 U.S. at 14.)

The distinction between *Greenbelt* and the case at bar is too obvious to require elaborate analysis. If defendant had described criminally innocuous conduct and had chosen to call it murder, he might have a point. Instead he stated facts which, reasonably interpreted, charged the individual plaintiffs with criminal homicide.

In view of the conclusion we have reached it is unnecessary to discuss whether the utterance also tended to injure the individual plaintiffs' professional reputations.

Defendant makes a lengthy argument that "as a matter of constitutional law the alleged utterance is not 'of and concerning' the OPOA as an entity or as a class" and that "its criticism of government is absolutely privileged as a matter of constitutional law." When we read his brief it seemed to us that these points were being advanced against the OPOA plaintiffs only.[6] At the oral argument, however, we were told that defendant does indeed make his points with respect to all plaintiffs. We shall therefore try to deal with them as best as we can, although we must confess that we may misunderstand the drift of the argument.

It will be recalled that in *New York Times* the Supreme Court, after delimiting "a state's power to award damages for libel in actions brought by public officials

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[6]As will be seen the judgment against them must be affirmed on independent state grounds and we shall therefore not reach the constitutional issue.

against critics of their official conduct" reviewed in detail the evidence that had been offered at the trial. It first held that the proof of actual malice was inadequate. It then held—and this is the part of the opinion on which defendant now relies—that the evidence was also constitutionally defective in that "it was incapable of supporting the jury's finding that the allegedly libelous statements were made 'of and concerning'" the plaintiff. Sullivan was, of course, one of the elected commissioners in Montgomery, Alabama and charged with the supervision of the police department. The only two statements in the defendant's publication which concerned police functions were these: 1. that "truck loads of police . . . ringed the Alabama State College Campus" after a demonstration; and 2. that Doctor Martin Luther King had been "arrested . . . seven times." These statements were false only in that the police had merely been deployed near the campus, which deployment did not follow the demonstration in question and in that Doctor King had been arrested only four times. Nowhere in the publication was it asserted that Sullivan was personally involved in any of the incidents. Evidence that the statements referred to him consisted solely of testimony by several witnesses to the effect that because of Sullivan's official position they assumed that the publication charged him with ordering or approving the police actions or being otherwise personally involved. The Alabama Supreme Court had held that inasmuch as it was common knowledge that police departments are under the control of commissioners, praise or criticism of the department is usually attached to the official in control.

Such reasoning was found to be constitutionally impermissible: "This proposition has disquieting impli-

cations for criticism of governmental conduct. For good reason, 'no court of last resort in this country has ever held, or even suggested, that prosecutions for libel on government have any place in the American system of jurisprudence.' City of Chicago v. Tribune Co., 307 Ill. 595, 601, 139 NE 86, 88 (1923). The present proposition would sidestep this obstacle by transmuting criticism of government, however, impersonal it may seem on its face, into personal criticism, and hence potential libel, of the officials of whom the government is composed. There is no legal alchemy by which a State may thus create the cause of action that would otherwise be denied for a publication which, as respondent himself said of the advertisement, 'reflects not only on me but on the other Commissioners and the community.' Raising as it does the possibility that a good-faith critic of government will be penalized for his criticism, the proposition relied on by the Alabama courts strikes at the very center of the constitutionally protected area of free expression. [Footnote 30 omitted.] We hold that such a proposition may not constitutionally be utilized to establish that an otherwise impersonal attack on governmental operations was a libel of an official responsible for those operations. . . ." (*New York Times v. Sullivan, supra,* 376 U.S. at 291-292.)[7]

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[7]Reference to the plight of "good-faith" critics of government seems, at first, puzzling. Such critics should prevail even if their defamatory utterance singles out the plaintiff by name. They do not speak with "actual malice." The explanation lies, we believe, in a quirk of the common law of defamation. As far as the identity of the person defamed is concerned, it is a tort of strict liability which, in Prosser's words, places "the printed, written or spoken word in the same class with the use of explosive or the keeping of dangerous animals." (Prosser, Law of Torts (3rd ed 1964) ch. 21, § 108, p. 792; *Cassidy v. Daily Mirror Ltd.,* [1929] 2 K.B. 331; *Hulton & Co. v. Jones,* [1909] 2 K.B. 44; 69 A.L.R. 734.) A defendant may be in entire

While the passage quoted from *New York Times* may well apply to the OPOA plaintiffs, we do not understand how defendant can use it as a shield with respect to the individual plaintiffs. There is an obvious factual distinction. In *New York Times*, after a trial, all that the plaintiff could prove was that certain witnesses had thought that he was personally involved in the incidents for the sole reason that he was in charge of the police department. Leaving aside the triviality of the falsehoods involved in that case, an entirely different picture would have been presented had the plaintiffs been police officers who were personally involved in the incidents referred to.[8] The rule applied in *New York Times* merely prohibits plaintiffs from coming

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good faith when launching an "impersonal attack on governmental operations." Thus he may accuse, on adequate though erroneous information, the police of a particular city of habitually rousting Negroes. Yet if by some "legal alchemy" the state may transform such an impersonal attack into a personal attack on the chief of police, the chief may quite easily be able to prove that as to him personally the plaintiff spoke with a reckless disregard for the truth.

[8]The paradoxical nature of Sullivan's position was noted by Professor Kalven in his article *The New York Times Case: A Note on "The Central Meaning of the First Amendment"* (1964) Supreme Court Review, 191, 199 (Kurland ed.): "The gossamer thread on which defendant's liability depended was made thinner by the fact that in order to show that the statements of fact were untrue, plaintiff had to reverse the logic by which he showed that the statements referred to him. On this aspect of the case, he argued that the arrests of Dr. King, for example, occurred before his tenure as commissioner and that as commissioner he had nothing to do with the perjury indictment. Therefore, he asserted, the statements were false as to him. There is revealed here a new technique by which defamation might be endlessly manufactured. First, it is argued that, contrary to all appearances, a statement referred to the plaintiff; then, that if falsely ascribed to the plaintiff something that he did not do, which should be rather easy to prove about a statement that did not refer to plaintiff in the first place. As it turned out, the Court did not have to confront this logic, which remains temporarily buried for resurrection at some later time."

forward and claiming that they are the victims of defamatory attacks on governmental actions for the only reason that such plaintiffs are, by virtue of their position, legally responsible for the action criticized. (See fn. 7, *ante.*) This is quite apparent from footnote 30 inserted by the Supreme Court: "Insofar as the proposition means only that the statements about police conduct libeled respondent by implicitly criticizing his ability to run the Police Department, recovery is also precluded in this case by the doctrine of fair comment. See American Law Institute, Restatement of Torts (1938), § 607. Since the Fourteenth Amendment requires recognition of the conditional privilege for honest misstatements of fact, it follows that a defense of fair comment must be afforded for honest expression of opinion based upon privileged, as well as true, statements of fact. Both defenses are of course defeasible if the public official proves actual malice, as was not done here." (*New York Times v. Sullivan, supra,* 376 U.S. at 292, fn. 30.) What the court tells us here is that it is not overlooking the possibility that the publication involved in *New York Times,* was not an "impersonal attack," but libeled Sullivan by criticizing his ability to run the police department. However, if that was the only sting of the libel, it was, of course, defeated by the lack of malice.

Defendant further maintains that quite regardless of what may or may not have been held or said in *New York Times,* even under traditional principles of defamation law, the individual plaintiffs have not alleged sufficient facts to show that his statement was made or reasonably understood to have been made about them. To make that point he relies on the failure of each

individual plaintiff to allege whether or not his own shots in fact hit Hutton.[9]

Defendant relies on *Golden North Airways v. Tanana Publishing Co.*, 218 F.2d 12, which relying in turn on *Noral v. Hearst Publications Inc., supra,* 40 Cal. App.2d at 353, simply held that where a large group is libeled, individual members of that group do not have a cause of action based merely on membership. That rule is well understood and, as shall be seen, we apply it in this case to the OPOA plaintiffs. The case with respect to the individual plaintiffs is quite different. The very purpose of the individual plaintiffs' criticized allegation is to lay a basis for their contention that they are not just run-of-the-mill members of a large group and that defendant did zero in on them as ascertainable persons. In *Noral* the court held that the general demurrer had been properly sustained because: ". . . An accusation such as that complained of cannot have the quality of a libel unless there be a certainty as to the individuals accused. There is nothing in the published article that makes a personal application to the plaintiff. He cannot by use of the colloquim make the language which is applicable to so large a group of persons be made specifically to refer to him. . . ." (*Noral v. Hearst Publications, Inc.*, 40 Cal.App.2d 348, 350.) In *Noral* there was nothing in the pleading to indicate that when the defendant libeled all officials of the workers' Alliance, it referred to the plaintiff. That is the very vice of the *Noral* complaint, which the individual plaintiffs overcome.

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[9]The allegation in question reads as follows: ". . . In the course of the performance of their duties at said time and place, plaintiffs COFFMAN, FREDERICKS and BROWN fired pistols at Bobby Hutton, who is the same Bobby Hutton referred to in Exhibit A. Plaintiffs have no information or belief as to which shots fired by said plaintiffs hit Bobby Hutton."

The claim that plaintiffs could not have been libeled because they did not allege which one of them hit the victim, seems absurd.[10] Perhaps none of their shots did. Perhaps, in truth, Hutton was killed by persons not connected with any police department. The successful pleading of extrinsic facts which indicate that the words in question were spoken concerning the plaintiff does not require a confession of all or part of the innuendo.

Finally defendant claims that malice is inadequately pleaded.

After pleading that the statement made by defendant was intended to be understood as meaning and imputing to plaintiffs that they, in effect, murdered Bobby Hutton, plaintiffs alleged: "Said statement and publication was made by defendants with evil motive and malice, willfully and wrongfully, and with intent to injure, disgrace and defame plaintiffs and with wanton and reckless disregard for the truth or falsity of the statements made."

Before considering the point, we should make it clear just what kind of malice we are talking about. Defendant's argument seems to assume that it is, at least in part, the kind of malice which defeats the privilege recognized by subdivision 3 of section 47 of the Civil Code: "A privileged publication or broadcast is one made—. . . 3. In a communication, without malice, to a person interested therein, (1) by one who is also interested, or (2) by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent, or (3) who is requested by the

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[10]The clear implication of the allegation in the complaint is that at least one of the three did find his target. We have already noted we are only concerned with a general demurrer.

person interested to give the information." While defendant does, of course, also talk about the "actual" malice which the Supreme Court in *New York Times* and other cases has recognized as defeating the privilege to criticize public officials, we believe he does himself an injustice in even mentioning malice as defined by the California cases. Such malice is a much broader concept. Thus in *MacLeod v. Tribune Publishing Co.*, 52 Cal.2d 536, the Supreme Court held that malice may be pleaded not only by alleging knowledge of falsity or the lack of an honest belief in the truth of the defamatory statement, but also by claiming a lack of reasonable grounds for believing the statement to be true. Further, under California law, malice is shown if the principal motive of the publication is hatred or ill-will or any cause other than the desire to protect the interest for the protection of which the privilege is given. (*Brewer v. Second Baptist Church,* 32 Cal.2d 791; *Biggins v. Hanson,* 252 Cal.App.2d 16, 20, fn. 2.) There are other ways, such as excessive publication, by which a qualified privilege can be defeated. (*Ende v. San Joaquin County Etc., Council* 23 Cal.2d 146, 161; *Swift & Co. v. Gray,* 101 F.2d 976, 979-980; Rest., Torts, §§ 599-605.) This is, of course, perfectly good state law.[11] It is, however, quite plain that not every form of malice, recognized

[11]It still is good law in all areas where the *New York Times* standard is inapplicable. The point is that under traditional tort doctrine, uninfluenced by First Amendment considerations relating to "debate on public issues" (*New York Times v. Sullivan, supra,* 376 U.S. at 270) we recognize forms of malice, or what the Restatement calls "abuse of privilege," in which the speaker's mind with reference to the truth of the charges falls short of the *New York Times* definition of "actual malice." It seems highly unlikely, however, that the United States Supreme Court will tolerate nice inquiries on whether a good-faith critic of a public official published his views excessively, or whether, on the occasion in question, he spoke solely from hatred or ill-will.

by state law, meets the constitutional standard for "actual malice" prescribed by *New York Times.* Thus in *Garrison v. Louisiana,* 379 U.S. 64, the defendant had been erroneously found guilty of criminal libel on a finding that he did not have a reasonable belief in the truth of his charges. That sounds a great deal like the "lack of reasonable grounds" of which our cases speak. (*MacLeod v. Tribune Publishing Co., supra,* 52 Cal.2d at 552; *Brewer v. Second Baptist Church, supra,* 32 Cal.2d at 791.) Similarly in *Greenbelt Coop. Pub. Assn. v. Bresler,* 398 U.S. 6, the judgment was reversed because the instructions to the jury defining malice permitted it to pass a finding merely on "spite, hostility or deliberate intention to harm" rather than on "an intent to inflict harm through falsehood." (*Garrison v. Louisiana, supra,* 379 U.S. at 73.)

Learned authority suggests that California courts have been both too severe in applying a requirement of pleading malice with particularity and that they have not been consistent. (See Chadbourn, Grossman, Van Alstyne, California Pleading § 999, and particularly the authors' comments on recent cases cited in the 1968 supplement.) Whatever may be the merits of requiring specificity in pleading when dealing with a many-splendored concept such as the malice referred to in subdivision 3 of section 47 of the Civil Code, the requirement is inappropriate when all the pleader relies on is the simple—though as yet not fully developed—standard laid down by the United States Supreme Court.

The Supreme court has explained several times what it meant by "actual malice" in *New York Times.* It is either knowledge that the defamatory statement is false or a reckless disregard for the truth. (*St. Amant v. Thomas,* 390 U.S. 727, 730; *Rosenblatt v. Baer,*

383 U.S. 75, 84; *Garrison v. Louisiana,* 379 U.S. 64, 79; *New York Times v. Sullivan,* 376 U.S. 254, 288.) The latter is the precise state of mind that plaintiffs have pleaded. We do not see how we can demand more at this stage, particularly when the Supreme Court itself has not given us a conclusive or inclusive definition of the term "reckless disregard." In *St. Amant* it said: "'Reckless disregard,' it is true, cannot be fully encompassed in one infallible definition. Inevitably its outer limits will be marked out through case-by-case adjudication, as is true with so many legal standards for judging concrete cases, whether the standard is provided by the Constitution, statutes, or case law. . . ." (*St. Amant v. Thompson, supra,* 390 U.S. at 730-731.)

Plaintiffs rely chiefly on *Noonan v. Rousselot,* 239 Cal.App.2d 447, 452-455. *Noonan* too was a case where malice in the *New York Times* sense had to be pleaded. The court found that the pleading was defective. It was. The complaint there contained two causes of action, one for libel, the other for a tort described by the pleader as a conspiracy to "unfairly deprive a candidate of a fair election." The libel count said nothing whatever about defendant's state of mind with respect to the truth of his charges. It contained a lot of pejorative adjectives and adverbs, conclusions and statements concerning the purpose of defendant's publication, but that was all. The conspiracy count did plead a lack of "good faith" and "fraud," but without further specification. Since fraud has many faces, not all of which involve knowing falsehood or reckless disregard for the truth, the pleading was inadequate.[12]

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[12]See definitions in sections 1572, 1573 and 1710 of the Civil Code. Thus one of the definitions of actual fraud, given in

(This footnote is continued on the next page)

The OPOA Plaintiffs

Although it would have been better for the OPOA, as an entity, to sue in its own name, we may overlook that point. (*Daniels v. Sanitarium Association,* 59 Cal.2d 602, 608-609.)

We recognize, of course, that an unincorporated association, such as OPOA, can be defamed. That is precisely what was held in *Daniels.* The only trouble with OPOA's ability to state a cause of action in itself is simply that there is absolutely nothing in defendant's statement or in any innuendo or inducement pleaded which by any stretch of the imagination can be construed as defamatory of the organization. The demurrer was properly sustained in that respect. (See *Washburn v. Wright,* 261 Cal.App.2d 789, 793-795.)

Turning to the matter as a class action brought on behalf of each individual member of the organization, we will pass the question whether a class action is an appropriate vehicle for defamation litigation. A recent case, *Los Angeles Fire & Police Protective League v. Rodgers,* 7 Cal.App.3d 419, 425, held, at least by dictum, that it is not. We are perfectly willing to consider that each and every member of OPOA has been individually named as a plaintiff. Still the case must fall on very basic traditional defamation principles.

The problem of defamatory statements about large groups which result in individual members of such groups appearing as plaintiffs in libel or slander actions is not new. The cases are annotated in 70 American Law Reports, Second Series, at 1382. Omitting ci-

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subdivision 2 of section 1572 is: "The positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true."

tations, Prosser's summary of the law is quoted in the footnote.[13] The Restatement of Torts is in accord (Rest., Torts § 564, comment c), as is California law (*Noral v. Hearst Publications Inc.*, 40 Cal.App.2d 348).

It seems obvious that if no single member of OPOA could have stated a cause of action against defendant, neither can all of them together. Zero plus zero equals zero.

The judgment in favor of the defendant and against the plaintiffs Robert Coffman, Robert Fredericks and Owen C. Brown is reversed. In all other respects it is affirmed.

Kaus, *P. J.*

We concur:

Stephens, *J.*

Aiso, *J.*

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[13]"Two or more persons may of course be defamed by the same publication. But difficulties arise when the defamatory words are directed at a group or class of persons rather than an individual. The plaintiff must first of all show that he is in fact a member of the class defamed. Beyond this, he must establish some reasonable personal application of the words to himself. If the group is a very large one, as in the case of such words as 'all lawyers are shysters,' they are considered to have no application to anyone in particular, since one might as well defame all mankind. Not only does the group as such have no action, but the plaintiff does not establish any personal reference to himself. But if the plaintiff is the only lawyer present, or for some other reason the words are reasonably understood by the hearers to be directed individually at him, the personal application may be made to appear, by pleading and proof of the special circumstances by way of inducement, and the innuendo. "*The rule has been applied quite uniformly to comparatively large groups or classes of a definite number, exceeding, say twenty-five persons.* When the group becomes smaller than that, as in the case of a jury, a family, an election board, or the four officers of an association, the courts have been willing to permit the conclusion that the finger of defamation is pointed at each individual. . . ." (Prosser, Law of Torts, (3rd ed. 1964) ch. 21, § 106, pp. 767-768. Emphasis added.)

APPENDIX "B".

Excerpt of Division Five Minutes December 31, 1971.

The Court of Appeal of the State of California, Second Appellate District.

Mullins, et al vs. Brando. Civil No. 35362.

THE COURT:

Petition for rehearing denied.

APPENDIX "C".

Order Denying Hearing After Judgment by the Court of Appeal, 2nd District, Division 5, Civil No. 35362.

In the Supreme Court of the State of California, in Bank.

Filed, Feb. 8, 1971.

Mullins, as President of the Oakland Police Officers Association et al. v. Brando.

Respondent's petition for hearing DENIED.

Wright
Chief Justice

APPENDIX "D".

Second Amended Complaint for Defamation.

Superior Court of the State of California, for the County of Los Angeles.

Samson B. Mullins, as President and on behalf of the Oakland Police Officers Association, an unincorporated association; Robert Coffman; Robert Fredericks and Owen C. Brown, Plaintiffs, vs. Marlon Brando: American Broadcasting Companies, Inc.; KGO-TV; and Does One through One Thousand, Defendants. No. 937 390.

Filed: Jan. 21, 1969.

Plaintiff, SAMSON B. MULLINS, on behalf of the OAKLAND POLICE OFFICERS ASSOCIATION, hereafter referred to as OPOA, and on behalf of all the members of OPOA, alleges for a First Cause of Action against all defendants:

1. That at all times mentioned SAMSON B. MULLINS was, and now is, President of OPOA and authorized to sue, and now sues, on behalf of OPOA and on behalf of the members of OPOA.

2. OPOA is an unincorporated association existing and doing business in Oakland, California. Said association is made up of all of the approximately 650 police officers of the Oakland Police Department.

3. OPOA has as its object and purpose to promote the collective welfare and good name of the members of the Oakland Police Department and to protect the interests of its members.

4. The members of OPOA are numerous and it is impractical to bring them all to Court. There is a well-

defined community of interest in the questions of law and fact involved in this action, affecting all members of OPOA. Plaintiff MULLINS, together with all other members of OPOA, constitute a definite, ascertainable class.

5. Members of OPOA, and OPOA itself, at all times mentioned have been, and are, well known and recognized by numerous and diverse citizens and people of the State of California, the City of Oakland, the City of Emeryville, and diverse other places, and have enjoyed and do enjoy among responsible persons a good name and reputation.

6. Plaintiff is ignorant of the true names and capacities of the defendants sued as DOES ONE through ONE THOUSAND. Plaintiff will amend to state true names and capacities when the same have been ascertained; plaintiff alleges on information and belief that each DOE defendant is responsible in some manner for the events and happenings herein referred to and proximately caused the injuries herein alleged.

7. At all times mentioned defendants KGO-TV, hereafter referred to as KGO, and AMERICAN BROADCASTING COMPANIES, INC., hereafter referred to as ABC, were corporations authorized to do business in California.

8. At all times mentioned each of the defendants was the agent and employee of each of the remaining defendants and was acting within the scope of his agency and employment.

9. At all times mentioned KGO and ABC were doing business as television broadcasters and networks disseminating programs of general interest to the public. Said programs were broadcast and received in Ala-

meda County, throughout the State of California, and at diverse other places by millions of persons. When said other places of broadcast and reception have been ascertained, plaintiff will ask leave to amend this complaint to set out said places specifically, in compliance with the Uniform Single Publication Act, and will seek damages therefor.

10. Defendant BRANDO is a resident of California and was invited to be a guest on the Joey Bishop Show, a program broadcast by KGO and ABC, and other defendants designated herein as DOES, and on or about April 25, 1968, defendant BRANDO appeared on said program and did the acts which are the subject of this action.

11. On or about April 25, 1968, at ABC Television Studios, Los Angeles, California, defendants broadcast, or caused to be broadcast, concerning and pertaining to OPOA and to the members of OPOA that language set out in *Exhibit A* attached hereto and incorporated herein.

12. Said statement and broadcast was received by the persons and at the times and places previously mentioned in Paragraph 9.

13. Said statement and broadcast, set out in Exhibit A, commencing with the words, "And I heard their views," (middle page one, Exhibit A) and concluding with the words, "Any number of witnesses," (top page two, Exhibit A) were intended by defendants to refer to, and did refer to a gun battle provoked by members of the Black Panther Organization which took place on or about April 6, 1968, in Oakland, California. Said battle involved members of the Oakland, Emeryville and other police departments, and mem-

bers of the Black Panther Organization. Said incident received much radio, television and newspaper coverage in Oakland, San Francisco, and throughout the State of California.

14. Plaintiffs ROBERT COFFMAN, ROBERT FREDERICKS, OWEN C. BROWN and numerous members of OPOA, on duty as police officers were present at the time and place of the events described in the previous paragraph. In the course of the performance of their duties at said time and place, plaintiffs COFFMAN, FREDERICKS and BROWN fired pistols at Bobby Hutton, who is the same Bobby Hutton referred to in Exhibit A. Plaintiffs have no information or belief as to which shots fired by said plaintiffs hit Bobby Hutton.

15. The following statements contained in Exhibit A are untrue and false and said statements were understood by the listeners mentioned in Paragraph 9 to be true:

(a) "The police department was out to get the Panthers."

(b) "He came out of the house with his hands up and he was told to run for the car and he was shot dead and killed."

(c) "They surrendered and he came out with his hands full up and he was told to run for the car. And he was shot down in front of any number of witnesses. . . ."

16. Defendants, by said statements, intended it to be understood by those perceiving said statements, and it was so understood as meaning and imputing: That OPOA and the members of OPOA were out to "get" members of the Black Panther Organization by use of

violent means; that pursuant to its intent to "get" Black Panthers, OPOA and the members of OPOA deliberately became involved in a "shoot-out" with the Black Panther Organization; that in the course of said "shoot-out" a person named Bobby Hutton emerged with hands up from a house where the "shoot-out" was taking place and was deceived and informed by OPOA and the members of OPOA to run to an automobile; that OPOA and the members of OPOA then deliberately shot and killed Bobby Hutton; that OPOA and the members of OPOA are and were of the mentality and disposition to use murder, deceit and ambush and other illegal actions as a policy for and means of performing its duties and that OPOA and the members of OPOA did in fact use such means and implement said policy in reference to Bobby Hutton at the time and place herein mentioned.

17. The statements set out in Paragraph 15(a) through 15(c) and the understandings, meanings and imputations set out in Paragraph 16 are slanderous and defamatory and have exposed and will in the future expose the OPOA and all the members of OPOA to hatred, contempt, ridicule and obloquy, and have caused OPOA and the members of OPOA great mental anguish, humiliation, shame and embarassment.

18. Said defamatory words were uttered with the intent to, and in fact did, attribute to plaintiffs the commission of a crime, to-wit: assault, assault with a deadly weapon, murder by ambush, murder and diverse other crimes, and said remarks were so understood by the viewers and listeners mentioned in Paragraph 9.

19. Said defamatory words were uttered with the intent to, and in fact did, directly injure plaintiffs in their offices, occupations and professions as police of-

ficers and representatives of police officers, by attributing to said plaintiffs general disqualification to hold said offices, occupations and professions, and said remarks were so understood by the viewers and listeners mentioned in Paragraph 9

20. Said statement and publication was made by defendants with evil motive and malice, wilfully and wrongfully, and with intent to injure, disgrace and defame plaintiffs and with wanton and reckless disregard for the truth or falsity of the statements made.

21. On or about May 7, 1968, plaintiffs caused to be served on defendants demands for correction and retraction of said statements as provided in Section 48(a) of the Civil Code of the State of California. Copies of said demands, marked Exhibits B, C and D, are incorporated herein. Said demands were served upon defendants at said time, together with a copy of Exhibit A, attached hereto.

22. Defendants have failed and refused to publish the demanded correction or retraction.

23. As a direct and proximate result of said statement and the publication thereof, OPOA and the members of OPOA have collectively been damaged generally in the sum of $10,000,000.00.

24. Because of said wilful and malicious publication OPOA and the members of OPOA are entitled to recover $10,000,000.00 punitive damages.

Plaintiff Samson B. Mullins, on behalf of OPOA and all the members of OPOA alleges for a second cause of action against defendants BRANDO and DOE only:

1. The following paragraphs of plaintiff Mullins first cause of action are incorporated herein: 1 through 20; 23 and 24.

2 The defamatory remarks uttered by defendant BRANDO were uttered to an audience of guests present in the ABC studios in Los Angeles, California at the time and place previously mentioned. Said defamation was complete at the time of its utterance, and was subsequently broadcast and republished as previously set out.

Plaintiff ROBERT COFFMAN alleges for a first cause of action against all defendants:

1. That he is, and was, at all times mentioned a member of the Oakland Police Department and OPOA.

2. That at the time and place referred to in Exhibit A and paragraph 13 he was present and on duty as a member of the Oakland Police Department.

3. Paragraphs 5 through 22 of MULLINS first cause of action are incorporated herein. Said incorporated paragraphs, when they refer to OPOA and the members of OPOA, shall be deemed to refer to plaintiff COFFMAN in singular person.

4. As a direct and proximate result of said statement and the publication thereof by defendants, plaintiff COFFMAN has been damaged generally in the sum of $1,000,000.00.

5. Because of said wilful and malicious publication by defendants, plaintiff COFFMAN is entitled to recover punitive damages in the sum of $1,000,-000.00.

Plaintiff COFFMAN alleges for a second cause of action against Defendants BRANDO and DOES ONE THROUGH TEN only:

1. Paragraphs 1, 2, 4 and 5 of Plaintiff COFFMAN's first cause of action are incorporated herein.

2. The following paragraphs from Plaintiff MULLINS' first cause of action are incorporated herein: 5 through 20; said incorporated paragraphs when they refer to OPOA and the members of OPOA shall be deemed to refer to plaintiff COFFMAN in singular number.

3. Paragraph 2 of Plaintiff MULLINS' second cause of action is incorporated herein.

Plaintiff ROBERT FREDERICKS alleges for a first cause of action against all defendants:

1. That he is, and was, at all times mentioned a member of the Oakland Police Department and OPOA.

2. That at the time and place referred to in Exhibit "A" and paragraph 13 he was present and on duty as a member of the Oakland Police Department.

3. Paragraphs 5 through 22 of MULLINS' first cause of action are incorporated herein. Said incorporated paragraphs, when they refer to OPOA and the members of OPOA, shall be deemed to refer to plaintiff FREDERICKS in singular person.

4. As a direct and proximate result of said statement and the publication thereof by defendants, plaintiff FREDERICKS has been damaged generally in the sum of $1,000,000.00.

5. Because of said wilful and malicious publication by defendants, plaintiff FREDERICKS is entitled to recover punitive damages in the sum of $1,000,000.00.

Plaintiff FREDERICKS alleges for a second cause of action against Defendants BRANDO and DOES ONE THROUGH TEN only:

1. Paragraphs 1, 2, 4 and 5 of Plaintiff FREDERICKS' first cause of action are incorporated herein.

2. The following paragraphs from Plaintiff MULLINS' first cause of action are incorporated herein: 5 through 20. Said incorporated paragraphs, when they refer to OPOA and the members of OPOA shall be deemed to refer to plaintiff FREDERICKS in singular number.

3. Paragraph 2 of plaintiff MULLINS' second cause of action is incorporated herein.

Plaintiff OWEN C. BROWN alleges for a first cause of action against all defendants:

1. That he is and was at all times mentioned a member of the Emeryville, California Police Department.

2. That at the time and place referred to in Exhibit "A" and paragraph 13 he was present and on duty as a police officer and was assisting Oakland Police Officers in the performance of their duties.

3. Paragraphs 5 through 22 of MULLINS' first cause of action are incorporated herein. Said incorporated paragraphs when they refer to OPOA and the members of OPOA shall be deemed to refer to plaintiff BROWN in singular person.

4. As a direct and proximate result of said statement and the publication thereof by defendants, plaintiff BROWN has been damaged generally in the sum of $1,000,000.00.

5. Because of said wilful and malicious publication by defendant, plaintiff BROWN is entitled to recover punitive damages in the sum of $1,000,000.00.

Plaintiff BROWN alleges for a second cause of action against Defendants BRANDO and DOES ONE THROUGH TEN only:

1. Paragraphs 1, 2, 4 and 5 of Plaintiff BROWN's first cause of action are incorporated herein.

2. The following paragraphs from Plaintiff MULLINS' first cause of action are incorporated herein: 5 through 20. Said incorporated paragraphs, when they refer to OPOA and the members of OPOA, shall be deemed tc refer to plaintiff BROWN in singular number.

3. Paragraph 2 of Plaintiff MULLINS' second cause of action is incorporated herein.

WHEREFORE, relief is prayed against defendants, and each of them, as follows:

1. By plaintiff MULLINS, on behalf of OPOA; and on behalf of all the members of OPOA: $10,-000,000.00 general damages; $10,000,000.00 punitive damages.

2. By plaintiff COFFMAN: $1,000,000.00 general damages; $1,000,000.00 punitive damages.

3 By plaintiff FREDERICKS: $1,000,000.00 general damages; $1,000,000.00 punitive damages.

4. By plaintiff BROWN: $1,000,000.00 general damages; $1,000,00.00 punitive damages.

5. By all plaintiffs: Costs and such other relief as the Court deems proper.

PETTIS & BROTT,
/s/ By Eugene E. Brott
Attorneys for Plaintiffs

Certificate of Mailing (Sec. 1013a(2) C.C.P. (omitted).

EXHIBIT A.

MARLON BRANDO

I thought . . . I didn't know what to do. I felt that we've come to the end of something and the beginning of something else . . . that was dangerous, awesome, and frightening and unbelievable. And I thought I'd better find out. I'd better do what I can. I just don't understand. I don't know enough. I don't get enough from the newspaper reports. I don't get enough from people I talk to. I better go and find out where it is in this country. What it is to be black in this country. What this rage is all about. And I went up to, I suppose a place which could be considered the center of rage, which is San Francisco and Oakland, and I visited with some Black Panthers there. And I heard their views and I listened to their thoughts and I was told that the police department was out to get the Panthers. One of the guys I met up there was a kid by the name of Bobby Hutton . . . He was 17 years old . . . A beautiful kid. And in two days he was in a shoot-out with the police. He came out of the house with his hands up and he was told to run for the car and he was shot dead and killed. And I subsequently went to his funeral and I saw that kid lying in the coffin and I thought . . . He'd been in the Panthers for two years and I thought . . . what was he doing there. What was he doing with a gun in his hand blazing at the police. How did it happen that

JOEY:

MARLON, I just want to correct one thing. I know the emotionalism that you're involved in . . . you did say prior to this that he came out without . . . with his hands up.

MARLON BRANDO:

He was told to come out. They surrendered and he came out with his hands full up and he was told to run for the car. And he was shot down in front of any number of witnesses. . . .

EXHIBIT B.

May 6, 1968

Mr. Marlon Brando
1940 Coldwater Canyon
Beverly Hills, Los Angeles County
California, 90210

Dear Mr. Brando:

This office represents the Oakland Police Association made up of all officers of the Oakland Police Department and all individual police officers present at the scene of the death of Bobby Hutton.

I am attaching a transcript of remarks made by you on the Joey Bishop show broadcast by the American Broadcasting Company on Thursday, April 25, 1968 and released locally on K.G.O. TV, Channel 7, San Francisco.

It is the position of my clients that the attached remarks by you are defamatory of the Oakland Police Department and the individuals involved.

Pursuant to Section 48a of the Civil Code of the State of California we have demanded retraction and correction by the American Broadcasting Company.

By this letter we demand of you that you retract and correct the attached defamatory remarks.

We also demand public apology in appropriate media to be agreed upon between this office and your representatives.

Sincerely,

Eugene E. Brott

EEB/g
Blind Env. cc w/Mr. Brott's home address as return

EXHIBIT C.

May 6, 1968

Director of Television Broadcasting
American Broadcasting Company
1330 Avenue of the Americas
New York City, N.Y.

Dear Sir:

This office represents the Oakland Police Officers Association made up of all officers of the Oakland Police Department and all individual police officers present at the scene of the death of Bobby Hutton.

In behalf of our clients we demand that you retract and correct all statements of Marlon Brando appearing in Exhibit A, pages 1 and 2 attached to this letter.

This defamatory material was broadcast by the American Broadcasting Network and K.G.O. TV on Thursday, April 25, 1968. The defamatory remarks were made on the Joey Bishop program by Mr. Brando.

This broadcast was grossly libelous and we therefore demand that the same be corrected or retracted within the time and in the manner as provided in Section 48a of the Civil Code of the State of California.

Sincerely,

EUGENE E. BROTT

EEB/g

EXHIBIT D.

May 6, 1968

American Broadcasting Company
K.G.O. TV, Channel 7,
277 Golden Gate Avenue
San Francisco, California

Gentlemen:

This office represents the Oakland Police Officers Association made up of all officers of the Oakland Police Department and all individual police officers present at the scene of the death of Bobby Hutton.

In behalf of our clients we demand that you retract and correct all statements of Marlon Brando appearing in Exhibit A, pages 1 and 2 attached to this letter.

This defamatory material was broadcast by the American Broadcasting Network and K.G.O. TV on Thursday, April 25, 1968. The defamatory remarks were made on the Joey Bishop program by Mr. Brando.

This broadcast was grossly libelous and we therefore demand that the same be corrected or retracted within the time and in the manner as provided in Section 48a of the Civil Code of the State of California.

Sincerely,

EUGENE E. BROTT

EEB/g

EXHIBIT "E".

September 25, 1970

BY MESSENGER

The Honorable Otto M. Kaus, Presiding Justice,
The Honorable John F. Aiso, Justice,
The Honorable Clarke E. Stephens, Justice,
Court of Appeal
Second Appellate District
217 West First Street
Los Angeles, California 90012

Re: Brando advs. Mullins
Case No.: 2d Civ. No. 35362

Sirs:

In arguing the above matter yesterday, we had intended, but inadvertently omitted, to cite to the court an important recent United States Supreme Court decision, *Greenbelt Cooperative Publishing Ass'n., Inc. v. Bresler,* 90 S. Ct. 1537, 38 U.S. Law Week. 4390 (decided May 19, 1970) which we had discovered prior to argument but which was, like the *Rodgers* case, decided after Respondent's brief was filed in this matter. By this letter, Respondent respectfully requests that the court consider the *Greenbelt* decision on the issue of whether Respondent's alleged statement is capable of a defamatory meaning. We feel that the *Greenbelt* decision, like *New York Times Company vs. Sullivan,* has pervaded the law of defamation with First Amendment standards and requirements, but in this instance, standards with respect to the application of state law concepts of defamatory meaning (as distinguished from concepts of privilege).

One of the undersigned, Stephen A. Kroft, spoke by telephone today with Mr. Peter Bertino, who appeared at the oral argument as a member of Pettis & Brott, attorneys for Appellants. Mr. Kroft informed Mr. Bertino of the *Greenbelt* decision and informed him that the undersigned would submit this letter to you today. Mr. Bertino stated that he had no objection to the submission of this letter but requested that a copy be sent to him and that Appellants be afforded the opportunity for reply.

The plaintiff in *Greenbelt* was a Maryland state legislator who was negotiating in his private capacity with the Greenbelt City Council concerning a real estate transaction. The real estate transaction involved acquisition of plaintiff's property for public purposes and had generated great public concern and controversy. During a heated and emotional City Council meeting at which the negotiations were being discussed, several citizens orally described plaintiff's negotiating position and tactics as "blackmail". Defendant newspaper reported the City Council meeting in two newspaper articles accurately relating the use of the word "blackmail". Under Maryland law "blackmail" was a criminal offense. Maryland Code Ann. Art. 27, 561-563 (1967). Plaintiff sued the newspaper publisher for libel and in his complaint alleged that the newspaper stories imputed to him the crime of blackmail. Plaintiff won a judgment for $17,500.00 in compensatory and punitive damages, which judgment was affirmed on appeal. The United States Supreme Court granted a petition for certiorari and reversed.

One of the issues discussed by the court was whether federal First Amendment standards had been properly applied by the state court in connection with de-

termining whether the evidence at trial was sufficient to support the judgment for plaintiff on the issue of defamatory meaning. The Supreme Court held that the evidence was not sufficient in light of Constitutional standards because as stated at 90 S. Ct. 1541:

> ". . . as a matter of constitutional law, the word 'blackmail' in these circumstances was not slander when spoken, and not libel when reported in the Greenbelt News Review". (Emphasis added)

Thus, the issue of whether a statement is capable of a defamatory meaning has become one not merely of the state law of defamation, but has become an issue of constitutional law based on the First Amendment freedom of unfettered and unrestricted speech. A court can no longer apply its own "gut" or considered interpretation to complained of language without giving careful and thoughtful consideration to the question of whether its interpretation, if applied so as to facilitate imposition of civil liability, violates the defendant's constitutionally protected First Amendment right of free speech.

In *Greenbelt,* the court observed at 90 S. Ct. 1540 that the subject matter of the news reports, i.e., public meetings of the citizens of a community concerned with matters of local governmental interest and importance, is one of particular First Amendment concern. This is patently true in the present case where Mr. Brando's alleged utterance constitutes public discussion of the reported acts of a governmental law enforcement agency in a confrontation with members of a militant black political party at a time when race relations and the authorities' handling of minorities are of immediate and widespread public concern. Thus, *Greenbelt* stands for the proposition that even words which might out of

this context be consdered accusatory and perhaps defamatory, are protected and therefore not defamatory in such a First Amendment context. It was this proposition which we were urgently attempting to convey to the court at yesterday's argument, and it was on this point that we had planned to cite *Greenbelt.*

The Court in *Greenbelt* further observed at 90 S. Ct. 1541 that:

> "Because the threat or actual imposition of pecuniary liability for alleged defamation may impair the unfettered exercise of these First Amendment freedoms, the Constitution imposes stringent limitations upon the permissible scope of such liability."

This court should not ignore those "stringent limitations" when interpreting the public comment on a matter of public concern which was allegedly made by Mr. Brando.

Finally, the Supreme Court stated the factual reasons for its decision at 90 S. Ct. 1542 as follows:

> "It is simply impossible to believe that a reader who reached the word "blackmail" in either article would not have understood exactly what was meant: it was Bresler's public and wholly legal negotiating proposals that were being criticized. No reader could have thought that either the speakers at the meetings or the newspaper articles reporting their words were charging Bresler with the commission of a criminal offense[7] On the contrary, even the most careless reader must have perceived that the word was no more than rhetorical hyperbole, a vigorous ephithet used by those who considered Bressler's negotiating position extremely unreasonable."

Similarly, in the present case, it is impossible to believe that any listener who heard the words attributed to Mr. Brando could have thought that by using the words singled out by Appellants, when viewed in the total context of Mr. Brando's alleged statements, Mr. Brando was charging Appellants or anyone else with any of the crimes alleged in Appellants' complaint, or that Mr. Brando was doing anything more than commenting on the condition of our society and citing a specific incident, about which he had been told, without laying blame on any of the participants, as an illustration of that condition. Certainly, it is the teaching not only of *Greenbelt,* but of *New York Times vs. Sullivan,* and cases cited therein, that it is not only a private citizen's right, but also his obligation, to stimulate and contribute to public discussion (even if heated) of such conditions and the activities of government in connection with them. See *New York Times Company vs. Sullivan,* 84 S. Ct. 710, at 721, 732 (1964).

Very truly yours,

ROSENFELD, MEYER &
SUSMAN

By /s/ NORMAN H. GAREY
By /s/ STEPHEN A. KROFT

NHG/SAK:lr
cc: Pettis & Brott
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IN THE

Supreme Court

OF THE

United States

Supreme Court, U.S.
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OCTOBER TERM, 1970

No. 1643

MARLON BRANDO,
Petitioner,

vs.

ROBERT COFFMAN, ROBERT FREDERICKS and OWEN C. BROWN,
Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION

On Petition for a Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District, Division Five, or in the Alternative to the California Supreme Court.

JOHN A. PETTIS, JR.
EUGENE E. BROTT
703 Central Building
Oakland, California 94612
Counsel for Respondents.

INTER-CITY PRINTING COMPANY, OAKLAND, CALIFORNIA 94607



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IN THE

Supreme Court

OF THE

United States

OCTOBER TERM, 1970

No. 1643

MARLON BRANDO,

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vs.

ROBERT COFFMAN, ROBERT FREDERICKS and OWEN C. BROWN,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION

On Petition for a Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District, Division Five, or in the Alternative to the California Supreme Court.

Respondents Robert Coffman, Robert Fredericks, and Owen C. Brown, oppose Petitioner's request for issuance of a Writ of Certiorari for the reasons herein stated.

QUESTIONS PRESENTED

1. Is a State court judgment "final" for the purpose of enabling review by this court, under 28 U.S.C.

§ 1257 (3), where the judgment does not conclude the litigation between the parties on the merits of the case, but merely determines that respondents have stated triable claims, and where the trial of such claims may give rise to additional Federal Constitutional questions?

2. Is the absolute and unqualified right to speak out in *impersonal* criticism of government, as guaranteed by the First and Fourteenth Amendments applicable to petitioner's alleged statement, so as to prohibit a defamation action by persons whose official conduct is attacked in the statement?

3. Are the statements attributed to petitioner capable of being understood as concerning, and referring to, respondents under First and Fourteenth Amendment standards?

4. Does the decision of the California court that petitioner's alleged utterance is capable of bearing a defamatory meaning, so as to support a slander suit, tend to abridge petitioner's rights of free speech?

5. Do the First and Fourteenth Amendment guarantees of free speech permit a public official to bring to trial a defamation action based on defamatory remarks about his official conduct where he has pleaded "malice" by alleging the requisite state of mind (i.e. knowledge of falsity or ". . . reckless disregard for the truth or falsity of the statements made?")

ARGUMENT

A. The Judgment of the District Court of Appeal Reversing the Trial Court's Dismissal of Respondents' Action After Demurrer Should Not Be Reviewed by This Court Because It Is Not a "Final Judgment" Under 28 U.S.C. 1257 (3).

United States Code, Title 28, Section 1257 provides in part as follows:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court . . .

It is not disputed that, inasmuch as the California Supreme Court denied petitioner's timely petition for a hearing, the District Court of Appeal's (DCA's) judgment overruling petitioner's demurrer is not subject to review in any other state proceeding. The judgment, nevertheless, fails to possess the finality required for review by this court since it is merely an intermediate step in the State court proceeding and leaves the case open for further litigation on the merits.

> *Market St. Ry. Co.* v. *Railroad Commission of the State of California*, 324 U.S. 548 (1945).

As was noted in *Gospel Army* v. *City of Los Angeles*, 331 U.S. 543 (1947), an unqualified reversal under California law is effective to remand the case to the trial court for trial on *all* issues presented by the pleadings. See also *Southern Pacific Company* v. *Gileo*, 351 U.S. 493 (1956) and 4 Cal Jur 2d § 666.

The finality rule is supported by substantial policy considerations in that it is designed to avoid the evils of fragmentary review and is recognized as an important factor in securing harmonious state-federal relations.

> *Republic Natural Gas Co.* v. *State of Oklahoma*, 334 U.S. 62 (1948)

Pertinent to this case, the judgment of a state appellate court passing on the ruling of the court below on demurrer is generally not considered final.

> *Great Western Telegraph Co.* v. *Burnham*, 162 U.S. 339 (1896); *Pope* v. *Atlantic Coast Line Railroad Co.*, 345 U.S. 379 (1953).

Admittedly, the concept of finality involves the accommodation of potentially divergent constitutional values and is not susceptible of mechanical application. A judgment may be considered final for the purpose of review where it concerns an issue anterior to the merits of a litigation and not related to the factual controversies of the case.

> *Mercantile National Bank* v. *Langdeau*, 371 U.S. 555 (1963); *Local No. 483 Construction & General Laborer's Union* v. *Curry*, 371 U.S. 542 (1963); *Rosenblatt* v. *American Cyanamid Company*, 86 S. Ct. 1 (1965).

Also, a state court judgment is final when it disposes of the main issues of the litigation, leaving little or no possibility that additional federal issues will arise in state proceedings.

> *Hudson Distributors, Inc.* v. *Eli Lilly & Co.*, 377 U.S. 386 (1964); *Radio Station WOW* v. *Johnson*, 326 U.S. 120 (1945).

Clearly, the DCA judgment leaves this case open for trial and for the possible reassertion of constitutional issues by petitioner if he believes at trial that respondents have failed to prove that the alleged utterance was understood as concerning respondents or that he acted in actual malice, etc. This case is distinguishable from *Mills* v. *State of Alabama*, 384 U.S. 214 (1966) since petitioner Brando has not conceded any of the essential facts which respondents must prove to recover damages. Also, unlike *Mills*, this case does not involve direct action by a state to abridge First and Fourteenth Amendment rights by means of criminal prosecution.

Respondents contend that they have pleaded a defamation case which is triable under federal constitutional standards. Since it appears that the merits of the case can only be determined by trial, this court should not heed petitioner's suggestion that the suit be summarily disposed of. (Petition, page 9).

B. The Challenged Statement Does Not Constitute Impersonal Criticism of Government Since It Relates to Respondents' Official Conduct; It Is Therefore Actionable by Them, If Malice Is Shown.

It is beyond dispute that the statements attributed to petitioner describe the conduct of individual police officers at a particular time and place. In their complaint, respondents plead that they were present as police officers during the events described in petitioner's remarks and that they fired their weapons at Bobby Hutton. (See Petitioner's Appendix "D", p. 24.) If these allegations are accepted as true, it follows that respondents' position is not comparable to that of the plaintiff in *New York Times Company* v. *Sullivan*, 376 U.S. 254 (1964), who was not shown at trial to have been present at the scene of, or to have directed, the criticized police conduct.

The DCA correctly read this court's decision in *New York Times* as prohibiting plaintiffs from recovering damages for defamatory attacks on governmental action "for the only reason that such plaintiffs are, by virtue of their position, legally responsible for the action criticized". (Petitioner's Exhibit "A", pp. 11-12.) As the DCA further observed, this court did not overlook the possibility that "the publication involved in *New York Times*, was not an 'impersonal attack,' but libeled Sullivan by criticizing his ability to run the police department. However, if that was the only sting of the libel, it was, of course defeated by the lack of malice." (Petitioner's Exhibit "A", p. 12.)

Petitioner's assumption that the remarks attributed to him were *on their face* merely impersonal criticism of government appears to rest on his omission to name any police officer and upon the fact that the remarks were made in a nationally televised "talk show." (Petition, p. 13.) Nonetheless, a listener might reasonably infer that he was speaking about the conduct of individual police officers who participated in the shooting of Bobby Hutton. *New York Times* v. *Sullivan, supra,* did not announce a rule which would prevent the officers concerned from recovering damages in a suit against petitioner, provided it is proven that petitioner's words were understood as referring to them and the requisite malice is shown.

C. Respondents Pleaded Facts Sufficient to Establish That the Statement Charged to Petitioner Was Made "Of and Concerning" Them Under First and Fourteenth Amendment Standards.

Although it is true that respondents alleged in their complaint that the statement charged to petitioner referred to a group of approximately 650 police officers, the DCA decided as a matter of law that the utterance could not be "of and concerning" a group of this size so as to permit recovery on the cause of action pleaded on behalf of all members of the Oakland Police Officer's Association (OPOA). (Petitioner's Exhibit A, pp. 13, 18.) It must be assumed that petitioner does not criticize this portion of the DCA decision, nor did the plaintiff adversely affected, Samson B. Mullins, seek further review in the California courts.

Regardless of such allegation, the three respondents before this court, as hereinabove discussed, also pleaded facts showing the special application of petitioner's statement to them. The DCA correctly analyzed the decision in *Golden North Airways* v. *Tanana Publishing Corp.;* 218 F. 2d 612 (9th Cir. 1954), as holding that "where a large group is libeled, individual members of that group do not have a cause of action based merely on membership." (Petitioner's Appendix A, p. 13.) On the facts of the instant case. the DCA properly determined that respondents had pleaded facts upon which a jury might find that the complained of utterance had particular reference to them as *ascertainable* members of a large group. (Petitioner's Appendix A, p. 13.)

Petitioner's suggestion that the court should review this case as an opportunity to render a definitive decision in the area of group defamation (Petition p. 15), is inappropriate because the DCA did *not* hold that a group defamation action could be maintained. Instead, consistent with petitioner's Constitutional arguments before that court, the DCA held that the OPOA could not sue as an entity, nor could its members maintain a class action. (Petitioner's Appendix A, p. 18.) The DCA also decided that respondents had pleaded facts upon which a finding could be made that petitioner's statement referred to them.

D. The Alleged Utterance Can Be Understood as Imputing a Crime to Respondents Under First and Fourteenth Amendment Standards.

The alleged utterance is not reasonably capable of bearing the innocent meaning urged by petitioner.

The utterance relates that the police were out to "get" the Panthers and that there was a "shoot-out" during which Bobby Hutton had "a gun in his hand blazing at the police". Then Hutton "was told to come out. They surrendered and he came out with his hands full up and he was told to run for the car. And he was shot down in front of any number of witnesses . . ."

The statement is devoid of any suggestion that Hutton was armed, resisting arrest, or fleeing from arrest *at the time he was shot.* Clearly, it is impossible to deduce from the words "surrender" and "hands full up" any meaning other than orderly submission to arrest. If the utterance truthfully describes the event in question Hutton was killed without justification.

Petitioner's reliance on *Greenbelt Cooperative Publishing Association* v. *Bresler*, 398 U.S. 6 (1970) is misplaced.

As the opinion of the DCA states:

> "The distinction between *Greenbelt* and the case at bar is too obvious to require elaborate analysis.

> "If defendant had described criminally innocuous conduct and had chosen to call it murder, he might have a point. Instead he stated facts which, reasonably interpreted, charged the individual plaintiffs with homicide." (Petitioner's Appendix "A", p. 8)

Greenbelt does establish that Federal constitutional standards must be applied by State courts in determining whether an utterance conditionally privileged under the First and Fourteenth Amendments is defamatory. The DCA decision in the instant case does not violate this principle since the defamatory import of petitioner's alleged utterance is clear.

E. Repondents' Pleading of Malice Is Sufficient Since It Meets the Definition Established by New York Times Company v. Sullivan, Supra.

Respondents allege in their complaint that petitioner's statement was made "with reckless disregard for the truth or falsity of the statement made." This is a clear and definite pleading of a state of mind which qualifies as malice so as to defeat the qualified privilege under *New York Times* v. *Sullivan*, supra.

It should be noted that this court in *Sullivan* announced a rule which prevented *recovery of damages* by public officials in State Court defamation actions, absent a showing of malice. See also, *St. Amant* v. *Thompson*, 390 U.S. 727 (1968). The court was not specifically concerned with *methods of pleading* defamation actions in State Courts.

This court might decline to prescribe rules for pleading malice on the ground that this is a matter better left to local practice so long as local pleadings do not reflect a constitutionally impermissible definition of malice.

CONCLUSION

For the reasons stated above, the petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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PROOF OF SERVICE

I, Eugene E. Brott, one of the attorneys for Petitioner and a member of the Bar of the Supreme Court of the United States, hereby certify that on this day I served three copies of the foregoing Brief for Respondents in Opposition as follows:

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Dated this 21st day of May, 1971.

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IN THE

Supreme Court of the United States

October Term, 1970
No. 1643

MARLON BRANDO,

Petitioner,

vs.

ROBERT COFFMAN, ROBERT FREDERICKS and OWEN C. BROWN,

Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

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I.

The Judgment of the District Court of Appeal Is "Final" for Purposes of Review Under 28 U.S.C.A. §1257.

Respondents have raised the argument that the judgment of the District Court of Appeal is not a "final judgment" subject to this court's review under 28 U.S.C.A. §1257. Respondents have cited three cases to support their argument.

Market Street Ry. Co. v. Railroad Commission of the State of California, 324 U.S. 548 (1945) did not involve a judgment affirming or overruling a demurrer. The rule stated in that case in 1945 (*i.e.*, that to be "final", a judgment must effectively determine the litigation and must not be merely an interlocutory or in-

termediate step in such litigation) has been disregarded time and again in cases decided by this court over the past 26 years. The cases cited on page 9 of the petition are but a few of such cases.

Great Western Telegraph Co. v. Burnham, 162 U.S. 339 (1896) held *only* that when the highest court of a state, upon a first appeal, in ordering a demurrer sustained, decides a federal question against plaintiff, and remands the case to the trial court which thereafter sustains the demurrer and enters a judgment of dismissal, plaintiff cannot have the trial court's judgment reviewed by this Court unless that trial court judgment has first been re-appealed to the state appellate court, because the judgment of the *trial* court is not a final judgment *in the highest court of the state* in which a decision in the suit could be had.

Admittedly, the *Burnham* case does contain dictum indicating that a state supreme court's order requiring the sustaining of a demurrer is not "final". Aside from the fact that we do not have such an order in the present case, this court has widely departed from the dictum of the *Burnham* case, which was decided over 75 years ago.

In *Pope v. Atlantic Coast Line Railroad Co.,* 345 U.S. 379 (1953), a case cited by both petitioner and respondents, this court held that a judgment by the Georgia Supreme Court overruling a demurrer was "final" for purposes of review by this court.

Mills v. State of Alabama, 384 U.S. 214 (1966) reaffirmed that the recent trend toward expanding the concept of "finality" (see cases cited on page 9 of the petition) encompasses a judgment overruling a demurrer, especially when the national policy of protect-

ing free speech is involved. As stated on pages 221-222 of the concurring opinion:

> "Indeed even had appellant been unwilling to concede that he has no defense—apart from the constitutional question—to the charges against him, we would be warranted in reviewing this case. That result follows *a fortiori* from our holdings that where First Amendment rights are jeopardized by a state prosecution which, by its very nature, threatens to deter others from exercising their First Amendment rights, a federal court will take the extraordinary step of enjoining the state prosecution. *Dombrowski v. Pfister,* 380 U.S. 479, 85 S. Ct. 1116, 14 L. Ed. 2d 22; *Cameron v. Johnson,* 381 U.S. 471, 85 S. Ct. 1751, 14 L. Ed. 2d 715. As already noted, this case has brought editorial comment on election day to a halt throughout the State of Alabama. Our observation in *NAACP v. Button,* 371 U.S. 415, 433, 83 S. Ct. 328, 338, 9 L. Ed. 2d 405, has grim relevance here: 'The threat of sanctions may deter * * * exercise [of First Amendment rights] almost as potently as the actual application of sanctions.' "

It is petitioner's contention that a civil libel suit for $6,000,000.00 by individual officers of a criticized government agency is as chilling to the exercise of freedom of speech as a criminal prosecution by the government agency itself.

As respondents admit on page 3 of their brief, the constitutional questions presented and decided by the District Court of Appeal upon the appeal from the trial court's judgment upon demurrer are now the law

of the case, and are not open to consideration upon subsequent appeals to the California Appellate Courts. *Blatz Brewing Co. v. Collins,* 88 Cal. App. 2d 438, 444 (1948). This Court has held that when an issue has been decided by a state court so as to become the law of the case, this court may review the state court's determination of that issue, even though further state proceedings are contemplated. *Johnson v. Muelberger,* 340 U.S. 581, 583 (1951).

As in *Mills v. State of Alabama, supra,* (freedom of speech), *Pope v. Atlantic Coast Line Railroad Co., supra,* (Federal Employee's Liability Act), and *Local #438 Construction & General Laborer's Union v. Curry,* 371 U.S. 542 (1963), (national labor policy), this case involves critical questions of important national federal policy which should not be denied an opportunity for immediate review by this Court until the expensive and time consuming formality of a trial is completed.

Indeed, the policy underlying the requirement of finality in 28 U.S.C. §1257 is best served by determination of important federal questions at the earliest opportunity, when otherwise the petitioner will be subjected to long and complex litigation which may prove a waste of time for all concerned if the Supreme Court thereafter decides the federal questions in petitioner's favor. *Mercantile National Bank at Dallas v. Langdeau,* 371 U.S. 555, 558 (1963).

This case is no different in its present posture from that of *Local #438 Construction & General Laborer's Union v. Curry, supra,* in which this Court reviewed a state court judgment granting a preliminary injunction which had the effect of requiring a trial on the

merits of the suit for a permanent injunction. This Court held in *Curry* that it should review the state court interlocutory judgment because the national federal labor policy would have been subverted by allowing a trial on the merits in the state court. Similarly, if petitioner is correct in his constitutional arguments, the national federal policy of protecting free speech will be subverted by allowing a trial on the merits in this case.

II.
Conclusion.

The crucial importance of the free speech issues involved in this case and the fact that the federal questions raised herein cannot ever be reviewed by the California Courts require a finding by this Court under the authorities cited by petitioner that the District Court of Appeal's judgment is "final" for purposes of review by this Court.

Dated: May 27, 1971.

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